No. 89-322

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioner,

v.

THARON RAWSON, Individually and as Guardian Ad Litem for SETH RAWSON and CINDY RAWSON; BERNIECE JOHNSON, Individually and as Guardian Ad Litem for MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON and JOHN RUSSEL JOHNSON; LAURA DUNBAR, as Guardian Ad Litem for RICKINA ROSSITER and GLEN ROSSITER, JR.; and MARY WOOD, as Guardian Ad Litem for LESLIE D. WOOD,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether §301 of the Labor Management Relations Act preempts a state tort claim for the negligent conduct and acts of the United Steelworkers Union, which occurred during the Union's safety inspection of the Sunshine Mine.

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The Respondents, Tharon Rawson, individually and as Guardian Ad Litem for Seth Rawson and Cindy Rawson; Berniece Johnson, individually and as Guardian Ad Litem for Michael Wayne Johnson, Ruth Ellen Johnson and John Russel Johnson; Laura Dunbar, individually and as Guardian Ad Litem for Rickina Rossiter and Glen Rossiter, Jr.; and Mary Wood, individually and as Guardian Ad Litem for Leslie D. Wood, oppose the Petitioner's

request for Writ of Certiorari to the Supreme Court, and file this Brief setting forth the reasons for their opposition.

STATEMENT OF THE CASE

On May 2, 1972, a fire broke out in the Sunshine Mine which claimed the lives of 91 workmen who were on duty. This action was brought on behalf of the heirs and children of four of those mine workers who died in the disaster. The four decedents in this case, John Rawson, Glen Rossiter, Wayne Johnson and Donald Wood were all working underground on the day of the fire. The decedents were members of the United Steelworkers of America, Local 5089, on the day they died.

The underlying action asserts the right to recover from the Petitioner for the wrongful death of these four men pursuant to Idaho Code § 5-311. Idaho Code § 5-311 provides:

> § 5-311. **Action for wrongful death** – When a death of a person . . . is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all circumstances of the case may be just.

Respondent's Complaint is couched in terms of negligence and fraud.[1]

COURSE OF PROCEEDINGS

In 1975 Petitioner Union moved for summary judgment on the grounds that Respondents' cause of action was preempted by § 9(a) of the National Labor Relations Act of 1935[2] and § 301 of the Labor Management Relations Act of 1947.[3]

The trial court granted the Union's motion on federal preemption grounds on January 29, 1976. (Pet.App.F. pp.161a-164a). The Idaho Supreme Court overruled the trial court's grant of summary judgment in *Dunbar v. United Steelworkers of America*, 100 Idaho 523, 602 P.2d 21 (1979). (Pet.App.E. pp.107a-160a). The court addressed the preemption issue as follows:

> Plaintiffs-appellants' claims are not necessarily based on the violation of the duty of fair representation and such is not the only duty owed by a union to its members. Further, we believe that even assuming the claims of plaintiffs-appellants fall within the general scope of the doctrine of preemption, nevertheless we deem it

---

[1] Respondents' fraud claim did not survive review by the Idaho Supreme Court. *Rawson v. United Steelworkers*, 111 Idaho 630, 716 P.2d 742 (1986).

[2] 29 U.S.C. § 159(a).

[3] 29 U.S.C. § 185.

> clear that the case also falls within the narrow exceptions to that same preemption doctrine which were described in Farmer v. United Brotherhood of Carpenters, 430 U.S. 290 (1977).

Pet.App.E. p.112a.

> We are cited to no authority which indicates that the duty of fair representation encompasses or displaces those duties created by a state law which requires a person, corporation or an unincorporated association, to refrain from engaging in wrongful conduct which results in death or injury to person or property. . . . If a Union's unreasonable *conduct* results in the death of one of its members, it should not be excused from liability because of the legal fortuity of its organizational status anymore than if its conduct brought death to a nonunion member.

Pet.App.E. p.114a. (Emphasis added).

> We believe the interests protected by state wrongful death statutes are unrelated to those governed by federal labor laws and we ascertain no conflict which will necessarily arise between the state and federal authorities as a result of permitting such traditional litigation in the state courts. We are cited to no authority which would permit the National Labor Relations Board to take cognizance of wrongful death claims against unions. We are cited to no authority holding that it may be fairly inferred that Congress meant to deprive the states of their powers of determining litigation brought under state wrongful death statutes. *See* Helton v. Hake, 386 F.Supp. 1027 (W.D. Mo. 1974); W. Prosser, Law of Torts § 127 (4th ed. 1971).

Pet.App.E. pp.115a-116a.

Subsequent to the court's remand in *Dunbar, supra,* the Petitioner Union again moved for summary judgment claiming that the facts of the case failed to establish any duty on behalf of the Union to its members and again raising the federal preemption issue. The trial court again granted summary judgment for the Union specifically disagreeing with the Idaho Supreme Court's ruling in *Dunbar* and requesting that the court "reconsider its previous holding." (Pet.App.D. p.102a).

Upon appeal of this dismissal, the court initially affirmed the trial court's ruling. (Pet.App.C. pp.49a-88a). Appellants moved for rehearing on their negligence claim. Upon rehearing the Idaho Supreme Court reversed the trial court's grant of summary judgment concerning the Plaintiffs' negligence claim and remanded the case for further proceedings. (Pet.App.B. pp.13a-48a).

The court acknowledged that the Union's *actions* characterized the basis of the negligence in Respondents' claim – not any contractual obligations. The court stated:

> Moreover, the characterization of the Miners' claim as one for mere nonfeasance which did not increase the risk of harm is incorrect. As the analysis below will demonstrate, the Union, through its representatives, did embark upon safety inspections, and the issue is whether they negligently *performed* their *undertaking*, or whether the Union's negligent *performance* resulted in the men being subjected to increased hazards or potential for death on the date of the fire and explosion that would otherwise have been the situation had the inspections been *performed* without negligence.

. . . .

> T]he Miners' cause is not premised on either a claim that the Union should perform management's safety functions or that the Union should make the workplace safe – rather, *the cause of action is premised upon the Union negligently performing* those safety *functions which it did, in fact, undertake.*

Pet.App.B. p.23a. (Emphasis added).

The court further noted:

> The Miners assert that evidence was presented to establish the following:
>
> (1) John Rawson, Glen Rossiter, Wayne Johnson and Don Wood did not have the use of self-rescuers (oxygen masks and cannisters);
>
> (2) Self-rescuers were stored in boxes with padlocks;
>
> (3) Some of the self-rescuers were eighteen years of age and were corroded so that the valve could not be turned to operate them;
>
> (4) Some of the self-rescuers were inoperative and others were used by miners who sensed them getting hot and discarded them not knowing that the development of heat was an indication that the self-rescuer was working;
>
> (5) The miners did not know how to use self-rescuers that may have been available and had not been trained in their use;
>
> (6) No self-rescuers were stored at the 5,400 level where John Rawson and Glen Rossiter were stationed; at other levels there were fewer cannisters than the usual number of men working at those levels; and that there were only six

> units at the major escape route at the 3,100 foot level.
>
> (7) There were no periodic fire drills or evacuation drills for miners working underground;
>
> (8) There were no opportunities for the miners under controlled circumstances to become familiar with proper exit procedures and sequences; and
>
> . . . .
>
> The Miners contend that most of these deficiencies could have been observed, and should have been observed, in the course of a reasonable inspection and, further, that recommendations could have, and should have, been made with regard to these deficiencies. A reasonable inference which the trial court should have drawn in favor of the miners is that the inspecting personnel were negligent in not seeing and reporting some of these conditions.
>
> . . . .
>
> Because the Union, . . . [had] *in fact, inspected* the mine, it owed the (minimal) duty to its members to exercise due care in inspecting and in reporting the findings of its inspection.

Pet.App.B. p.27a-29a. (Emphasis added).

> Our narrow holding today is that the *Union, having inspected,* assumed a duty to use due care in inspecting and, from the duty to use due care in inspecting arose further duty to advise the committee of any safety problems the inspection revealed. Moreover, since an action for wrongful

> death is a creature of our Idaho statute, is of substantial local interest, and traditionally has been committed to the jurisdiction of the courts of the state, and because *the instant action does not require an interpretation of the terms of the collective bargaining agreement*, we do not consider it to be preempted by federal law.

Pet.App.B. p.34a. (Emphasis added).

The Union thereafter petitioned this Court for a Writ of Certiorari. The Court granted certiorari and remanded *Rawson* for further consideration in light of the recently published case of *IBEW v. Hechler*, 481 U.S. 851 (1987). *See, Rawson*, 482 U.S. 901 (1987).

Upon remand the Idaho Supreme Court reconsidered *Rawson* regarding the sole issue directed by this Court:

> [W]hether the state-law tort actions of the plaintiffs herein are preempted by § 301 of the Labor Management Relations Act of 1947. . . .

Pet.App.A. p.3a.

The Idaho Supreme Court affirmed its opinion in *Rawson* regarding federal preemption, distinguishing it from the substantially different issue presented by the Court in *Hechler, supra*. (Pet.App.A. p.3a). The Union again seeks certiorari on the issue of preemption in order to overturn the Idaho Supreme Court's final determination in *Rawson*.

ARGUMENT

Petitioner contends that "the Idaho Supreme Court's decision on remand is inconsistent with this Court's decision in *Hechler* . . . " and "displays an unremitting hostility to federal preemption." (Pet. for Writ of Cert., p. 21).

Respondent miners assert that the state tort claim in *Rawson* is "'independent' of the collective-bargaining agreement," *Lingle v. Norge Div. of Magic Chef, Inc.*, ___ U.S.___, 108 S. Ct. 1877 (1988); further, *Rawson* is distinguishable from *Hechler, supra*.

In *Rawson* the court is not faced with looking at the Collective Bargaining Agreement (hereafter C.B.A.) in order to interpret whether any duty was imposed by contract. *Rawson* only requires an examination of the *act* or *conduct* of the Union regardless of why the act was undertaken and regardless of whether the act conformed with any contract provision. Since the Union *undertook to inspect*, and *neligently performed* that duty, this is an issue "independent" of the C.B.A. and it must be left for the trier of fact at trial to determine whether "that inspection was negligently performed under Idaho tort law." (Pet.App.A. p.5a).

The Idaho court directly addressed the analysis in *Hechler* and appropriately distinguished that case from *Rawson*. In *Hechler* the Respondent conceded that the "nature and scope of the duty of care owed [her] is determined by reference to the collective-bargaining agreement." *Hechler* 481 U.S. at 851, fn.5; (Pet.App.A. p.4a). The Court pointed out at footnote 5 of *Hechler* that it was in her brief to this Court that Respondent argued for the first time that her claim was "not dependent on

any interpretation of the collective-bargaining agreement. . . ." *Id.* The Court concluded that "it is too late in the day for Respondent to present to the Court this new-found legal theory." *Id.* at 864.

As the Idaho Supreme Court noted:

> Thus, the instant case is clearly distinguishable from *Hechler* in that here the state tort basis of the action was not abandoned, but has been pursued consistently both at the trial and appellate levels and the tort exists *without reference* to the collective bargaining agreement.
>
> Accordingly, Hechler is inapposite and does not stand for the proposition that a federal LMRA preemption exists in the instant case.

Pet.App.A. p.7a. (Emphasis added).

The Idaho court's analysis is buttressed by this Court's language in Hechler that:

> Respondent's allegations of negligence assume significance if – and only if the Union, in fact, had assumed the duty of care that the complaint alleges the Union breached.

Hechler, 481 U.S. at 861.

Rawson is premised on the negligence theory that the Union, once performing inspections of the mine had a duty to do so in a non-negligent fashion. It is dramatically different from *Hechler* in which the Union was only alleged to have a contractual duty to engage in inspection or regulation of workplace safety. The Union did *in fact* actively engage in the duty of safety inspection in *Rawson* and it is unnecessary to "reference," let alone *interpret* the

C.B.A. to determine the nature of or extent of the duty owed to the mine workers.

The following discussion in *Hechler* focuses the critical analysis that this Court later illuminated in *Lingle, supra:*

> In *Allis-Chalmers,* the Court applied the rule that a tort claim "inextricably intertwined with consideration of the terms of the labor contract" is pre-empted under § 301, 471 U.S., at 213, and concluded that the claim in *Allis-Chalmers* fell within that category. The employee's allegation there was that his employer and its insurance company intentionally had failed to make required disability payments under a plan negotiated in a collective bargaining agreement, and that, in so doing, they had breached a state law insurance duty to act "in good faith" in paying disability benefits. *Id.,* at 206. The Court observed that any attempt to assess liability on the part of the employer would inevitably involve interpretaion of the underlying collective-bargaining contract. First, the disability plan adopted in the collective-bargaining agreement might itself have included an implied requirement of good faith that the employer breached by its conduct. The Court explained: [I]t is a question of federal contract interpretation whether there was an obligation under this labor contract to provide the payments in a timely manner, and, if so, whether Allis-Chalmers' conduct breached that implied contract provision." *Id.,* at 215. Second, under the relevant state law, the duty of "good faith" on which the plaintiff relied "intrinsically relate[d] to the nature and existence of the contract." *Id.,* at 216. The concept of "good faith" meant "'being faithful to one's duty or obligation,'" *ibid.,* quoting *Hilker v. Western Automobile Ins.*

> Co., 204 Wis. 1, 13, 235 N.W. 413, 414 (1931), and, under state law, that duty was determined primarily by analyzing the responsibilities agreed to by the insurer in the written contract. The Court reasoned: "Because the right asserted not only derives from the contract, but is defined by the contractual obligation of good faith, any attempt to assess liability here inevitably will involve contract interpretation." 471 U.S., at 218. Inasmuch as federal law must control the uniform meaning given to contract terms in a collective-bargaining agreement, however, an employee's state-law tort action that necessarily rests on an interpretation of those terms is preempted by § 301. *Id.*, at 218-219.

Hechler, 481 U.S. at 858-859.

The key to whether there is federal preemption under § 301 thus depends on whether it is necessary to *interpret* the C.B.A., as noted in the above language from *Hechler*. There is no issue in *Rawson* whether the Union fulfilled its duty under the C.B.A. Non-compliance or compliance with the terms of .he C.B.A. is irrelevant to the analysis of this case. The focus under the state-based tort action is on the *actions* or *performance* and whether the duty, once undertaken, was negligently performed. Respondents' tort claims do not rely upon nor are they "inextricably intertwined with consideraton of the terms of the labor contract." *Allis-Chalmers*, 471 U.S. at 213.

The Court's decision in *Lingle, supra*, restated a concise history of the critical § 301 cases. With respect to *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962), Justice Stevens, for a unanimous court, noted that this Court was "confronted with a straightforward question of contract *interpretation*. . . ." *Lingle*, ___U.S.___, 108 S.Ct. at 1880.

(Emphasis added). In *Allis-Chalmers* the scope of the contract was "'ascertained from consideration of the contract itself.'" *Id.* at 1881.

In discussing the retaliatory discharge case, *Horton v. Miller Chemical Co.*, 776 F.2d 1351 (CA7 1985), cert. denied, 475 U.S. 1122, 106 S.Ct. 1641, 90 L.Ed.2d 186 (1986), the Court reasoned:

> Each of the *purely factual questions* pertains to the *conduct* of the employee and the *conduct* of the employer. Neither of the elements requires a court to *interpret* any term of a collective-bargaining agreement.

Lingle, 108 S.Ct. at 1882. (Emphasis added).

> Thus, the state-law remedy in this case is "independent" of the collective-bargaining agreement in the sense of "independent" that matters for § 301 pre-emption purposes: *resolution of the state-law claim does not require construing the collective-bargaining agreement.*

Id. (Emphasis added).

> [A]s long as the state-law claim can be resolved without *interpreting* the agreement itself, the claim is "independent" of the agreement for § 301 pre-emption purposes.

Id. at 1883. (Emphasis added).

The Court then specifically expressed the delineation between federal and state functions respecting § 301 preemption:

> Today's decision should make clear that *interpretation* of collective-bargaining agreements remains firmly in the arbitral realm; . . . judges

> can determine state law involving labor management relations only if such questions do not require *construing* collective-bargaining agreements.
>
> Second, there is nothing novel about recognizing that substantive rights in the labor relations context can exist without *interpreting* collective-bargaining agreements.

Id. at 1884. (Emphasis added).

Again, the key distinction the Court expresses is that preemption depends on whether the C.B.A. must be *interpreted* or *construed;* the Court reiterates this notion in its holding and accompanying footnote:

> In sum, we hold that an application of state law is pre-empted by § 301 of the Labor Management Relations Act of 1947 only if such application requires the *interpretation* of a collective-bargaining agreement.[12]

---

[12] . . . Thus, as a general proposition, a state law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement and a separate state law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state law analysis would not be thereby pre-empted. As we said in *Allis-Chalmers Corp. v. Lueck*, 471 U.S., at 211, 105 S.Ct., at 1911, "not every dispute . . . tangentially involving a provision of a collective-bargaining agreement is pre-empted by § 301.

Id. at 1885. (Emphasis added).

Petitioner relies on various cases to support its petition for certiorari, all of which are distinguishable from

Rawson or superceded by *Lingle*. *Hechler* is distinguishable not only because the *separate* tort claim was first raised on appeal to this Court, but also because *Hechler* involved a case of *nonfeasance* instead of the *misfeasance* that characterizes *Rawson*.

The issue of *nonfeasance* versus *misfeasance* is not new to Idaho law. Huntley, J., makes the following reference in his analysis in the majority opinion of *Rawson:*

> Recently, in Carroll v. United Steelworkers of America, 107 Idaho 717, 692 P.2d 361 (1984), the Court ruled that mere nonfeasance, even if it amounted to willful neglect to perform a contract, is insufficient to establish duty in tort. In *Carroll*, a Union member accused his Union of *failing to perform* protective actions relative to conducting safety inspections at the work site, but did not allege negligent performance of those actions once undertaken. In *Carroll*, no inspections were made. In the instant case, by contrast, the safety committee did inspect the mine and the miners allege *not* that the Union members of the safety committee *failed* to inspect, but that they actually performed the duty of inspection in a negligent manner and failed to report what should have been obvious safety problems, the duty to report necessarily flowing from the act of inspection. Hence the instant case does not present a situation of nonfeasance, but of malfeasance.

Pet.App.B. pp.23a-24a. (Emphasis added).

Petitioner relies upon *Condon v. Local 2944, United Steelworkers, Etc.*, 683 F.2d 590 (1982), a *nonfeasance* case:

> Appellant has failed to demonstrate that any material factual issues exist as to whether Local undertook any such duty. He was afforded ample notice and opportunity to produce such

> evidence, if he had any. We, therefore, conclude that there is no genuine issue of material fact and that Local is entitled to judgment on all counts as a matter of law.

Condon, 683 F.2d at 596.

Petitioner also relies upon *Richardson v. United Steelworkers of America*, 864 F.2d 1162 (5th Cir. 1989). Therein the Court noted:

> The duty which the Union allegedly breached is described in the original petition as "a duty" which the Union had "[a]s the bargaining agent for Plaintiffs" (emphasis added). No other source of duty is alleged in the original petition.

Id. at 1165. The court appropriately noted that *Richardson*, like *Hechler*, "does not present the question of whether the Union was subject to 'an independent state-law duty of care . . . arising simply from the relationship of a union to its members.' " *Id.* at 1167, citing *Hechler*. In *Richardson* the Plaintiffs did not allege "any breach of a state tort duty that exists independently of the NLRA-established collective bargaining relationship . . . ." *Id.*

Contrary to Petitioner's claims regarding preemption in this case, *Rawson* is indistinguishable from *Linn v. United Plant Guard Wkrs. of Amer., Loc 114*, 383 U.S. 53 (1966), and *Farmer v. United Broth. of C. & J. of America, Local 25*, 430 U.S. 290 (1977), for the purpose of preemption analysis. *Linn* addressed the tort of defamation of character and *Farmer* addressed the tort of intentional infliction of emotional distress; both cases involved tort actions distinct from the C.B.A. Without detailing the valuable analysis of these opinions, the critical similarity between *Linn*, *Farmer* and *Rawson* is that all three cases

involved an overt *act* characterized as either a *misfeasance* or *malfeasance*, whereas *Hechler* was a pure and simple case of *nonfeasance* which required an analysis of the C.B.A. to define the duty.

As this Court recognized in *Allis-Chalmers*, *supra*, Congress never intended for national labor law to preempt all state law claims. This is particularly true in *Rawson*, as in *Farmer*, in which "the Board would lack authority to provide the defamed individual with damages or other relief." *Linn*, 97 S.Ct. at 1062. To preempt Respondents' claims herein literally leaves them without remedy against an active tortfeasor whose misfeasance has caused the loss of life. Perhaps the most compelling argument against preemption in *Rawson* is that there exists no available remedy under national labor law for the damages suffered by the miners' widows and children. What the Union demands in its Petition for Writ of Certiorari is tort immunity for labor unions tantamount to sovereign immunity not even enjoyed by the Federal Government.

The analysis in *Lingle* establishes the appropriate guidelines for assessing whether a C.B.A. must be *interpreted* to grant relief or whether a state cause of action is *independent* of federal labor concerns. There is no need to further define the preemption analysis in *Lingle* by granting a Writ of Certiorari in *Rawson*.

CONCLUSION

In light of this Court's analysis in *Hechler* and *Lingle*, and in light of the Idaho Supreme Court's analysis distinguishing *Rawson* and *Hechler*, there is no substance to Petitioner's request that certiorari be granted in this matter. The facts in *Rawson* are *independent* of federal labor law concerns and preemption is therefore inappropriate. Since the law is well-settled with regard to this case, Respondents pray that Petitioner's Writ of Certiorari be summarily denied.

RESPECTFULLY SUBMITTED,

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